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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Provision of Directory Listing Information)
)
Under the Communications Act of 1934,)
)
As Amended)
_____)

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COMMENTS OF EXCELL AGENT SERVICES, L.L.C.

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SUMMARY

Excell Agent Services, L.L.C. ("Excell"), a wholesale directory assistance services provider, supports the Commission's tentative conclusion that independent directory assistance providers ("Directory Assistance Providers") such as Excell, enhance competition in the provision of directory assistance, which in turn facilitates local telephone competition. Excell agrees with the Commission that the Commission should encourage such competition, whether or not the particular directory assistance provider also provides telephone exchange service or telephone toll service. However, the Commission's tentative conclusion that a directory assistance provider that provides neither telephone exchange service nor telephone toll service does not fall within the class of entities that are entitled to nondiscriminatory access to directory assistance, runs counter to the Commission's goal of encouraging competition for the provision of directory assistance services.

Directory Assistance Providers are fighting an uphill battle in trying to provide their competitive services. First, the Regional Bell Operating Companies and LECs that possess most of the directory listing information in this nation, do not currently provide access to directory assistance to independent Directory Assistance Providers at the same rates, terms, and conditions that the RBOCs and LECs provide to themselves or to other LECs. Second, competing providers of telecommunications services are entitled to rates for directory listings that are, in some instances, over 53 times better than the rates that Directory Assistance Providers are paying for the same listings. There is no reason for the Commission to support and perpetuate the concept that only "competing providers of telephone exchange service and telephone toll service" should be privy to the benefits of nondiscriminatory access to directory assistance data.

Independent Directory Assistance Providers provide competitive benefits to the directory assistance services industry that are equal to, if not more significant than, the competition afforded by either the incumbent LECs or the heretofore favored "competing providers." Furthermore, there is no reason that a "competing provider" necessarily provides directory assistance service that is superior to that of an independent Directory Assistance Provider. There is nothing about a "competing provider" that necessarily makes it better suited for the task of providing directory assistance. Therefore, there should not be a distinction made between these two types of entities in the context of access to directory assistance. Allowing Directory Assistance Providers access to directory assistance listing data is even more important to "competing providers" after the Commission's decision to remove directory assistance from the list of unbundled network elements which incumbent LECs must provide to competitive carriers.

The Commission does have the authority under the Communications Act of 1934, including § 4(i), to include Directory Assistance Providers in the class of entities entitled to nondiscriminatory access to directory assistance. One of the ways in which the Commission may grant these benefits to Directory Assistance Providers is by authorizing the same as agents for the carrier principals that hire them to provide directory assistance services to their customers. The agency doctrine is an accepted principle of common law and practice and is further supported by § 217 of the Act.

If the Commission determines that it cannot extend the benefits of nondiscriminatory access through the agency relationship between carriers and Directory Assistance Providers, it has another option. Sections 201(b) and 202(a) of the Act authorize the Commission to require LECs to provide independent Directory Assistance Providers access to directory assistance databases at the same rates, terms and conditions under which competing providers of telephone exchange service and

telephone toll service obtain such access. The Commission should conclude that a LEC's refusal to provide access to raw directory assistance data to a Directory Assistance Provider is an unjust and unreasonable practice prohibited by § 201(b) and constitutes discrimination that is unjust and unreasonable under § 202(a). Furthermore, if and when the Commission determines that Directory Assistance Providers are entitled to nondiscriminatory access to directory listing data, these providers should be permitted to provide their services in any format and there is no reason to allow LECs to charge rates that vary with the manner in which the data is used.

The recently adopted National Directory Assistance Order permitted US WEST to provide region wide non-local directory assistance. However, in its grant, the Commission requires that US WEST make available to unaffiliated entities whether or not they are providers, all of the in-region directory listing information it uses to provide directory assistance service to its in-region customers at the same rates, terms and conditions it imputes to itself. If the Commission extends this requirement to all of the other RBOCs and other LECs, it need not determine whether the LECs need to provide out of region non local directory listings to requesting entities, whether or not this data is obtained internally or from a third party. Additionally, the three year sunset deadline set in § 271(f)(1) should have no bearing on the nondiscrimination requirements set forth in the National Directory Assistance Order. If the Commission does set a sunset date for the LEC provision of nondiscriminatory access to directory assistance data, the Commission should set that sunset at a minimum of 7 years from the date an order in this rulemaking is effective.

**Before the
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COMMENTS OF EXCELL AGENT SERVICES, L.L.C.

Excell Agent Services, L.L.C., (“Excell Agent Services” or “Excell”), hereby submits its comments in response to the notice of proposed rulemaking issued in this proceeding,¹ and states as follows:

INTRODUCTION

Excell Agent Services is a provider of directory assistance, call branding, call completion, operator assisted yellow pages, toll and assist and access alternatives such as Asynchronous Transfer Mode or ATM, voice over Internet protocol ("IP"), switched access and hubbed access. Excell

¹ Implementation of the Telecommunications Act of 1996: Provision of Directory Listing Information under the Communications Act of 1934, As Amended, Notice of Proposed Rulemaking, CC Docket No. 99-273 (rel. Sept. 9, 1999) (“Notice” or “NPRM”).

Agent Services provides its wholesale customers with its own directory assistance service in competition with the Regional Bell Operating Companies ("RBOCs"), other incumbent or competitive local exchange carriers ("LECs") and other directory assistance providers. Excell Agent Services maintains and updates a database compiled from several directory listing sources and supplemented by data it obtains from certain RBOCs as well as other sources. The directory listing information obtained from traditional sources such as published white pages and similar commercial publications of business listings may be nearly three months out of date at the time of publication due to the continuous flux in telephone service users. The business of providing directory assistance services requires access to daily updated directory assistance databases.

Excell submits that in order to be competitive with the established directory assistance services of the RBOCs and other LECs, it should be afforded access to the directory assistance listings of the LECs in same manner the LEC afford access to themselves. Additionally, Excell is currently forced to pay a higher rate for directory assistance listings than competitive LECs ("CLECs") because the owners of the directory assistance databases will not treat Excell as one of the providers that are entitled to nondiscriminatory access to directory assistance databases under § 251(b)(3). For instance, Excell buys Texas Business/Government listings from Southwestern Bell Telephone at a rate of \$.0585 per listing, as opposed to the \$.0011 rate at which "telecommunications providers" may purchase the same information.

Excell believes that competition in the directory assistance market is in the public interest. The full set of nationwide directory assistance listings has been fractured into a handful of regional

depositories administered by different LECs,² and the LECs do a disservice to their own customers and to the customers of other carriers by resisting efforts to make directory assistance listings more widely available on reasonable and non-discriminatory terms. There are periodically well-publicized reports of the problems with directory assistance data, but incumbent LECs, recognizing the advantages to their entrenched local service monopolies inherent in their control over directory listing databases, have refused to respond. Competition in the directory assistance market by itself has not and will not produce a satisfactory result for end users of directory assistance listings.³ LECs have been slow to provide data even to competitive carriers under §251(b)(3).⁴ Excell doubts that a fair result will obtain without the intervention of the Commission.

While Excell agrees with the Commission's tentative conclusions that the presence of non-LEC affiliated directory assistance providers ("Directory Assistance Providers") in the market benefits competition, it disagrees with the tentative conclusion that a Directory Assistance Provider is not directly entitled to the benefits of §251(b)(3). Section 251(b)(3) requires LECs to provide nondiscriminatory access to directory assistance data "competing providers of telephone exchange service and telephone toll service." The FCC, along with several state PUC's and several LECs, have interpreted this language to exclude independent Directory Assistance Providers from the class

² Industry experts have claimed that the "key problem" with directory assistance is the "lack of a common telephone-number database." See Russ Mitchell, You May Want To Call 911 after 555-1212, U.S. News and World Report, Mar. 1999, at 52.

³ "Some of the regional Bells are probably trying to delay things as long as possible to keep competitors like Excell at a disadvantage." Forbes, Feb. 1997, at 81.

⁴ For example, Ameritech introduced nationwide directory assistance in 1996 without data from most, if any, of the other LECs. However, in response to a hypothetical request from Bell Atlantic for listings of Ameritech, a representative of Ameritech stated that Ameritech's response would be "Go jump off the nearest pier." Mike Mills, Long-Distance Information? Don't count on it, Washingtonpost.com (Sept. 21, 1997) <http://www.Washingtonpost.com>.

of entities entitled to use §251(b)(3) to gain access to directory assistance databases. It is not a necessary conclusion that a Directory Assistance Provider is not a provider of telephone exchange service or telephone toll service. Nor is it a necessary conclusion that the Commission lacks the authority to extend the protections of § 251(b)(3) to other entities. Under § 4(i) of the Act, the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Act], as may be necessary in the execution of its functions."⁵

⁵ 47 U.S.C. § 154(i).

I. UNDER SECTION 251(b)(3) THE COMMISSION CAN AND SHOULD GRANT DIRECTORY ASSISTANCE PROVIDERS NONDISCRIMINATORY ACCESS TO LEC DIRECTORY ASSISTANCE DATABASES

- a. The Directory Assistance Providers That Are Agents of a “Competing Provider” Are Entitled to Nondiscriminatory Access to Directory Assistance Pursuant to Sections 251(b)(3), 217, and 4(i) of the Act.

The Commission has asked for comment “on whether a non-carrier directory assistance provider is entitled to non-discriminatory access to directory assistance under section 251(b)(3) when that provider is an agent of a LEC or other carrier that qualifies for the benefits of section 251(b)(3).”⁶ Excell believes that both the law of agency, generally, and §217 of the Communications Act, in particular, support the conclusion that the Commission should extend the benefits of §251(b)(3) to Directory Assistance Providers when acting as the agent of a competitive carrier, and Excell urges the Commission to use its authority under § 4(i) to adopt a rule to that effect.

To establish an agency relationship, a principal appoints an agent to act on behalf of the principal,⁷ and within the scope of the appointment, the act of the agent would be the act of the principal, with attendant risks and benefits. Section 217 of the Communications Act provides that the act of a carrier’s agent is the act of both the agent and the carrier.⁸ Thus, a competing carrier would be liable for the act of a Directory Assistance Provider appointed and acting as the carrier’s agent. It logically follows that the agent should enjoy any benefits attendant to acting as a carrier’s agent.

⁶ Notice, para. 184.

⁷ Restatement (Second) of Agency, §1 (1958).

⁸ See 47 U.S.C. § 217.

This would not be the first occasion that the FCC has permitted the use of agents in a context outside of attributing liability of the agent to the principal. For instance, the FCC permits the National Exchange Carrier Association to file tariffs on behalf of, and provide billing and collection services for, certain incumbent LECs.⁹ Also, in 1984, the Commission allowed the RBOC customer premises equipment ("CPE") subsidiaries to act as agents in jointly marketing their basic services with their enhanced services.¹⁰ Unless the BOCs' CPE subsidiaries were permitted to engage in joint marketing, they would have been unable to compete effectively with independent vendors (who were free to offer CPE-network service packages), and consumers would have been deprived of meaningful choices as to communications packages at that time.¹¹ Moreover, the Commission acknowledges that incumbent LECs use third parties or their own affiliates to publish their white pages and yellow pages in the order attached to this Notice. Additionally, the Commission, on behalf of independent publishers, requires each carrier that provides subscriber list information for its own directory publishing operations, to make available to any requesting directory publisher any written contracts that it has executed for the provision of subscriber list information for directory publishing purposes to itself, an affiliate, or an entity that publishes directories on the carrier's behalf.¹² Surely if the Commission can recognize the import of the agency relationship in the directory publishing context, it ought to authorize the agency relationship in the directory assistance context.

⁹ See, e.g., Communique Telecommunications, Inc. d/b/a LOGICALL, 10 FCC Rcd 10399 (1995).

¹⁰ See American Information Technologies Corp., 98 FCC 2d 943, 945, 951-52 (1984), recon. denied, 59 Rad.Reg. 2d (P & F) 309 (1985).

¹¹ Id.

¹² Order, para. 58.

In urging adoption of such a rule, Excell asks the Commission to take note of the possibility that a competitive carrier may only desire to appoint a Directory Assistance Provider as a limited agent for the purpose of obtaining the directory assistance listings of one or more LECs for use in providing a directory assistance service on behalf of the competitive carrier. The provision of directory assistance is labor intensive. Thus, numerous telecommunications carriers have purposefully chosen to use outside Directory Assistance Providers. Directory Assistance Providers provide a viable, efficient and competitive directory assistance solution from one source without requiring the carrier to hire new personnel or restructure its internal operations. A limited agency to acquire directory assistance listings would still render the Directory Assistance Provider an agent for purposes of § 217, because the competing provider of telephone toll service or telephone exchange service would be hiring the Directory Assistance Provider to perform a task it is able to do but chooses to have someone else do. It would be anti-competitive to prohibit a competitive telecommunications provider from using a necessary tool for competition merely because it allows a third party to gain access to the tool pursuant to Sections 251(b)(3) and 217 of the Communications Act. Moreover, there is no distinction made in § 217 between limited agents and full-blown agents of a LEC.

The Commission asks whether, if a carrier's agent is entitled to nondiscriminatory access under Section 251(b)(3), that agent may use such access to provide directory assistance to persons other than the carrier's customers. Excell submits that it would be nonsensical to prevent a Directory Assistance Provider from providing directory assistance listings already obtained as agents pursuant to §251(b)(3) to entities other than the principal's customers. Requiring multiple purchases of the

same directory assistance listings would require a Directory Assistance Provider to invest more in hardware (at least for data storage), software, transport, updates and is not economically justifiable.¹³

Additionally, a Directory Assistance Provider will often be acting as agent for several competitive carrier customers at once. It makes the most sense to provide services to these carriers' customers using one database comprised of listings from one purchase. Requiring multiple purchases would discourage, rather than promote, competition in the directory assistance market and would limit the directory assistance options available to new competitive carriers. In fact, requiring Directory Assistance Providers to make multiple purchases would effectively prevent the Directory Assistance Provider from working for more than one carrier principal, as it would be practically impossible to recover the investments made on the multiple purchases.

The Commission's suggestion that it extend the benefits of an agency relationship to Directory Assistance Providers, and mirror the existing liability scheme, is a sound suggestion. Excell urges the Commission to act on its suggestion and adopt a rule to this effect forthwith.

- b. Once a Directory Assistance Provider Obtains Access as an Agent of a Competing Provider, There Exist No Statutory or Other Restrictions on the Manner In Which a Directory Assistance Provider Uses Directory Assistance Data.

The Commission asked whether an entity that obtains directory assistance data pursuant to § 251(b)(3) may use the data for directory publishing or other purposes. Excell submits that once a Directory Assistance Provider obtains directory assistance data from a LEC, there is absolutely no basis for any restrictions on the use of such data (other than any restrictions which may derive from other sections of the Communications Act). For example, a Directory Assistance Provider should

¹³ First Data Corporation invested \$23 million in Nortel equipment and services in 1998 for a platform. The Operator Daily, October 8, 1999.

be permitted to provide listings to end user customers by reading the number, by using an automated response unit (activating a computerized recording of the number) through electronic directory assistance, or by any other means. The Commission has invited comment on how it should respond to the technological advances which have blurred the historical distinction between directory publishing and directory assistance.¹⁴ Excell submits that the same technological advances are changing the provision of directory assistance, through automation and the ability to change the same directory assistance listing from text to an audio format and back again. Furthermore, Excell urges the Commission to stimulate competition through establishment of a clear policy of unfettered ability to use data that is purchased by an agent of a competitive carrier for the benefit of any party that would have been entitled to it in the first instance, and in the format desired by the end users of the data, not in a single format dictated by the LEC in a license agreement.

¹⁴ Notice, para. 180.

- c. A Directory Assistance Provider Which Offers Call Completion Services is a Competing Provider of Telephone Toll Service and is Entitled to Nondiscriminatory Access to LEC Directory Assistance Databases Under Section 251(b)(3).

Excell believes that a Directory Assistance Provider offering call completion services is a “competing provider of telephone exchange service and telephone toll service” and should be entitled to the benefits of §251(b)(3). Telephone toll service means “telephone service between stations in different exchanges for which there is made a separate charge not included in contracts with subscribers for exchange service.”¹⁵ Excell’s call completion offerings include the required elements of telephone toll service. Excell offers call competition service as either Optional Call Completion (each caller has the option of call completion) or Forced Call Completion (each call is automatically completed to the requested listing). Excell, following identification of the desired directory assistance listing, will complete the call for the caller. One of the options available is completion of the call over circuits resold by Excell. Because Excell, in the provision of wholesale directory assistance services, offers carriers the option of having Excell provide incoming circuits from the carrier’s distant switches (i.e., from the carrier’s switch to Excell’s switch) and the option of having Excell provide terminating transport (i.e., from Excell’s switch to the desired listing), there exist some calls where all of the interstate transport may be provided by Excell.

The topology for such a call would be for the directory assistance caller to be routed by the directory assistance caller’s carrier to a trunk group from the carrier’s switch. That trunk group would be provided by Excell. The trunk group would terminate on an Excell switch. The Excell switch has a terminating field of trunks, provisioned by Excell, that are capable of terminating calls, and the Excell directory assistance database management system would direct Excell’s switch to

¹⁵ 47 U.S.C. §153(48)

terminate the call over Excell's terminating field of trunks to the number for which the directory assistance caller requested a listing.

In adopting a rule which extends the benefits of §251(b)(3) to offerors of call completion services, Excell requests that the Commission recognize three particular aspects of the wholesale directory assistance market (and account for the same in this proceeding): sale cycles tend to be long, contracts are often for several years and the telecommunications industry is undergoing a period of substantial consolidation. These three factors could produce the result that a Directory Assistance Provider consistently offering call completion may not be completing calls from time to time. The benefits of §251(b)(3), once extended, will have a significant, positive impact on Directory Assistance Providers and will stimulate competition in the directory assistance market. That beneficial competition would be adversely disrupted if a LEC were able to turn off the flow of directory assistance listings to a Directory Assistance Provider if that Directory Assistance Provider is not at one or more points in time. The converse risk, that a Directory Assistance Provider once offering call completion ceases forever to offer call completion, is minimal, and the upfront investment required to offer call completion is so substantial that it is highly doubtful that a Directory Assistance Provider would offer call completion without any intention of continuing to offer call completion.

II. IF THE COMMISSION DECIDES IT MAY NOT EXTEND 251(b)(3) TO DIRECTORY ASSISTANCE PROVIDERS, IT SHOULD REQUIRE LECs TO PROVIDE ACCESS TO DIRECTORY ASSISTANCE PROVIDERS PURSUANT TO §§ 201 AND 202 OF THE ACT.

If the Commission does not reverse its tentative conclusion regarding the status of Directory Assistance Providers as competing providers, there is recent and well-reasoned precedent for adopting a rule to extend the benefits of §251(b)(3) to Directory Assistance Providers. As counsel to InfoNXX has noted in correspondence with the Common Carrier Bureau,¹⁶ the Commission has previously extended relevant portions of Section §251(b)(3) “to entities that are not expressly covered by its terms but that compete with covered entities and would be at a competitive disadvantage without the protections of §251(b)(3).”¹⁷ Relying on the grant of authority under §202(a) of the Communications Act, and in order to avoid an unjust practice and imposition of unjust fees under §201(b) of the Communications Act, “the Commission required incumbent local exchange carriers to provide access to telephone numbers to entities, such as paging carriers, that are not providers of telephone exchange service or telephone toll service”¹⁸ Access to directory assistance listings by Directory Assistance Providers is every bit as crucial to the development of vibrant local competition as is access to telephone numbers by paging carriers. Excell unequivocally supports the tentative conclusion of the Commission that Directory Assistance Providers “cannot compete without access to directory assistance equal to that provided to providers of telephone exchange service and telephone toll service pursuant to section 251(b)(3).” Indeed, a decision not

¹⁶ Letter from Gerald L. Waldron and Mary Newcomer Williams, Counsel for InfoNXX, to Chief, Common Carrier Bureau (filed August 10, 1999) (“InfoNXX August 10, 1999 Letter”).

¹⁷ Id., at 2. Id., para. 190; see also Stuart Whitaker, The Operator Daily, May 4, 1999 (“third party data is considerably less current than the LEC information.”)

¹⁸ Notice, para. 189.

to extend the protections of §251(b)(3) would disadvantage Directory Assistance Providers and would appear to endorse the perpetuation of unjust charges and unjust practices.

Section 201 of the Communications Act prohibits unjust charges and unjust practices in connection with an interstate communication service. In plain meaning, directory assistance is interstate communication. Calls for directory assistance are made on an interstate basis, and quoting a directory assistance listing is “communication.”¹⁹ LECs impose unjust, unreasonable charges on Directory Assistance Providers and, by charging Directory Assistance Providers more than competitive LECs for directory listings, engage in an unjust practice. For example, Southwestern Bell Telephone Company (“SWBT”) charges Directory Assistance Providers a rate that is more than 53 times the approved cost-based rate for telecommunications providers.²⁰ Rates offered by US WEST to Excell are more than two times the rates offered to competitive carriers, and the rates US WEST offers to competitive carriers are more than 22 times the SWBT cost-based rates. It is highly doubtful that a listing costs US WEST more than 22 times what it costs SWBT, and a rate which is more than 54 times the SWBT cost-based rate is certainly neither fair nor just.

¹⁹ Communication means “[i]nformation given.” Black’s Law Dictionary, Fifth Edition, 1979; see also 47 U.S.C. §153(51) (defining “wire communication” or “communication by wire” as “the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.”)

²⁰ SWBT charges Excell \$.0585 per listing while the Public Utility Commission of Texas, in connection with an application by SWBT to provide nationwide directory assistance, determined SWBT’s cost-based rate to be \$.0011 for an initial electronic listing. See Application of Southwestern Bell Telephone Company to Introduce a New Optional Service, Nationwide Listing Service, Pursuant to Subst. R. § 23.25, Order, Texas P.U.C., at 13 (signed Apr. 8, 1999); see also Southwestern Bell Telephone Company, Directory Assistance Listing Service Tariff, Revised Section 1, Sheet 5 (1999).

Cost appears to remain an issue even for the largest carriers. The Operator Daily reports that Sprint splits its directory assistance provision for local and long-distance carriage, that local and long-distance Sprint customers do not receive data from the LECs, and that local and long-distance nationwide directory assistance is provided by two database companies.²¹

Further, ever since the database of directory assistance listings has been fractured into regional depositories administered by incumbent LECs, the incumbent LECs have configured the directory assistance listings databases in different ways and have tariffed per-query directory assistance products which are held out to be equivalent to access to the raw data of directory assistance listings. Thus, certain LECs simply refuse to sell direct access to their directory assistance listing raw data to Directory Assistance Providers at any fair and just price in, at least, partial reliance on the offering of products which are per-query, read-only or of other limited utility to a Directory Assistance Provider. The Commission should reject such substitutes to full access to raw directory assistance data as it has done for competitive carriers. It is expensive enough to construct and maintain one system for providing nationwide directory assistance,²² but it would be prohibitive to build platforms for directory assistance based only on such per-query, read-only products. Directory Assistance Providers should not be required to invest in multiple sets of hardware, software, and access interfaces, or to implement varying protocols, in order to compete with LECs and competitive carriers. Allowing LECs to so discriminate against Directory Assistance Providers in this manner is patently unjust.

²¹ The Operator Daily, October 8, 1999.

²² First Data Corporation invested \$23 million in Nortel equipment and services in 1998 for a platform. *Id.*

Furthermore, clear evidence exists in support of Excell's claim that the LECs have unjustly and unreasonable discriminated against Directory Assistance Providers. Indeed, the anti-competitive behavior of the LECs towards Directory Assistance Providers can be demonstrated by the competitive service responses from, and the attacks by, the LECs themselves. Tacitly acknowledging the increasingly competitive nature of the market and the profits to be made therein, a representative of Ameritech stated as far back as February of 1997 that "Directory assistance is going to be a profit center."²³ One of US WEST's stated purposes for introducing national directory assistance was to allow its customers to make a phone call to US WEST instead of a long distance call (thereby putting US WEST in direct competition for directory assistance with Directory Assistance Providers and competitive carriers). The President of US WEST recognized the competitive presence of Directory Assistance Providers, without mentioning the same directly, when he stated, also in early 1997, that US WEST's introduction of national directory assistance would give customers "a one-stop shop for all their directory assistance needs."²⁴ At the same time, US WEST acknowledged the presence of Directory Assistance Providers in the market and promoted US WEST's incumbent position, and particularly its unique access to directory listing data, as a competitive advantage.²⁵ BellSouth has been even more explicit and brazen in touting its favored incumbent position as a competitive advantage over competing Directory Assistance Providers. In January of 1998, Palmer Hoyt, BellSouth Director of Corporate & External Affairs stated that "[o]ne

²³ Id., at 81 (quoting Michael Hollobow, Directory Assistance Product Manager, Ameritech).

²⁴ US WEST Communications, Press Release, Apr. 29, 1997.

²⁵ "While other directory assistance providers have had problems with accuracy, US WEST has had a long history of providing reliable directory information." Id., Statement Frank Bowman, US WEST Vice President, New Product Development.

advantage we have over most competing national (directory assistance) services is access to the most up-to-date BellSouth in-region listings.”²⁶

In addition to attempts to differentiate services, introduction of a national directory assistance service has almost always been heralded as a benefit to customers -- a quicker, easier way to get directory assistance across the nation.²⁷ As noted by the Chairman of Ameritech, “This is a service our customers want because it makes it easy and simple to reach family, friends and get business numbers throughout the country.”²⁸ Similarly, a Southwestern Bell official has stated that “Consumers throughout Arkansas can now obtain telephone numbers throughout the USA by dialing 1-411, the same number they *already* know and trust for *local* directory assistance.”²⁹

While the Commission recently determined that it is “generally no longer necessary for incumbent LECs to provide competitive carriers with the seventh element of the original list -- access to their operator and directory assistance services,³⁰ even the publicly available evidence of competition reveals that the LECs have an unfair competitive advantage, often promoted openly, in providing directory assistance: unique access to the most up-to-date in-region listings and a concomitant ability to control dissemination of the same. In this light, removing directory assistance from the list of network elements which must be provided appears premature at least unless access to directory assistance listings for Directory Assistance Providers is mandated. Excell supports the

²⁶ BellSouth Corporation, Press Release, Jan. 21, 1998.

²⁷ See Ameritech Corporation, Press Release, September 10, 1996.

²⁸ Statement of Richard C. Notebaert, Chairman of Ameritech.

²⁹ Statement of Mary Long, Southwestern Bell Area Manager for Retail Directory Assistance (Emphasis in original). See also Southwestern Bell Telephone Company, Press Release, August 5, 1998.

³⁰ FCC News Release, “FCC Promotes Local Telecommunications Competition, Adopts Rules on Unbundling of Network Elements,” September 15, 1999.

Commission's unbundling order as it relates to directory assistance, but now urges the Commission to require LECs to provide the "alternative sources" with directory assistance listings as a means of encouraging not just competition, but fair competition. Thus, while the emergence of competition from Directory Assistance Providers has clearly begun to benefit consumers, the only way to ensure that such benefits are sustained is to guarantee access by Directory Assistance Providers to up-to-date in-region listings maintained by any incumbent LEC.

III. THE USE OF A DIRECTORY ASSISTANCE LISTING BY A DIRECTORY ASSISTANCE PROVIDER OR COMPETING PROVIDER DOES NOT CHANGE THE COST OF A LISTING TO A PROVIDING LEC, AND, THEREFORE, THE COMMISSION SHOULD PROHIBIT LECs FROM CHARGING DIRECTORY ASSISTANCE PROVIDERS AND COMPETING PROVIDERS RATES WHICH VARY WITH THE USE OF PROVIDED DATA.

The cost to LECs of maintaining directory assistance listings are not affected by the costs of a Directory Assistance Provider. The innovation in new product offerings from Directory Assistance Providers, and the future of their ability to innovate in a cost efficient manner, depends on access to raw directory assistance listings in a single format at a single price -- which should be no greater than the cost the LECs impute to themselves. No permitted use, and no manipulation of the directory assistance listing data stream after the data stream is received from the facilities of a LEC, can increase the cost of providing that data stream. The innovation comes downstream.

Excell agrees that LECs, competitive carriers and Directory Assistance Providers alike ought to be able, separately or in combination, to enhance directory assistance services in response to end user demand, but the Commission should not permit LECs to charge Directory Assistance Providers or competitive carriers higher rates for directory assistance listings merely because a Directory

Assistance Provider or competitive carrier has determined that delivery of a listing is better made in a manner that is tailored specifically for its customers. For instance, certain Directory Assistance Services permit the caller requesting a listing to receive the listing by e-mail so that it can be stored for later use, read back from a remote location or sent by fax.³¹ Allowing such disparate pricing would be an unjust practice when it is not in response to any incremental cost of a LEC.

Additionally, disparate pricing will be more and more difficult to police. If a Directory Assistance Provider gives out a listing to a carrier's subscriber, there is no reason to believe that the Directory Assistance Provider will know all the media in which the listing will be stored by the subscriber. Technology will also make it increasingly difficult to determine how to apply any disparate pricing scheme. For example, Excell currently offers voice over Internet protocol ("IP") access. If a LEC can charge one price for listings Excell gives out audibly and one price for listings given out over the Internet (on the assumption that listings given out over the Internet would be in a text format), what price applies to a listing given out audibly by voice over IP? More importantly, what difference could it make to the cost of the LEC in providing the data stream to the Directory Assistance Provider? Excell urges the Commission to state plainly that LECs must provide directory assistance listings at the cost they impute to themselves and without regard to the format or media

³¹ A simple search of the world wide web reveals the existence of dozens of unified messaging companies. PulsePoint produces "a carrier-grade and standards-based open system solution" which allows a carrier's subscribers to manage messages with a telephone, fax, PC or wireless phone. See www.dsc.com. Lucent Technologies offers Octel Unified Messenger™, which permits a subscriber to "use a single interface to check all your messages – voice mail, e-mail and fax." See www.octel.com/um/index.html. General Magic offers Portico.™ Portico is "your personal assistant who connects you to the information you rely on each day. With Portico you can now access your e-mail, voice mail, address book, calendar, news, and stock quotes over the phone or the web and reply to messages right then and there. No waiting. No missed opportunities." www.genmagic.com/portico/portico_home.shtml.

in which the Directory Assistance Provider or end-user may provide or store directory assistance listings.

- IV. THE COMMISSION SHOULD CLARIFY THAT ALL LECs PROVIDING NATIONWIDE DIRECTORY ASSISTANCE MUST PROVIDE NONDISCRIMINATORY ACCESS TO ALL IN-REGION DIRECTORY LISTING INFORMATION TO UNAFFILIATED ENTITIES AND, THEREFORE, THE COMMISSION NEED NOT DECIDE WHETHER TO REQUIRE NONDISCRIMINATORY ACCESS TO NONLOCAL DIRECTORY ASSISTANCE DATA PURSUANT TO SECTION 251(b)(3)

The Commission released the Notice in this proceeding on September 9, 1999. On September 27, 1999, the Commission released a Memorandum Opinion and Order, which had been adopted back on June 9, 1999, regarding the provision of national directory assistance.³² In the Notice, the Commission has asked for comment on whether “all LECs providing national directory assistance must provide nondiscriminatory access to nonlocal directory assistance data pursuant to section 251(b)(3).”³³ In the National Directory Assistance order, however, the Commission concluded that “US West must make available to unaffiliated entities all of the in-region directory listing information it uses to provide region wide directory assistance service at the same rates, terms and conditions it imputes to itself.”³⁴

Excell urges the Commission to extend the National Directory Assistance Order explicitly to all of the Bell Operating Companies (“BOCs”) rather than merely requiring a LEC to pass through

³² In the Matter of Petition of US WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance, Petition of US WEST Communications, Inc. for Forbearance, The Use of N11 Codes and Other Abbreviated Dialing Arrangements, Memorandum Opinion and Order, CC Docket No. 97-172, CC Docket No. 92-105, FCC 99-133 (rel. Sept. 27, 1999) (“National Directory Assistance Order”).

³³ Notice, para. 193.

³⁴ National Directory Assistance Order, para. 37 (emphasis added).

listings it has obtained from outside its region.³⁵ Thus, unaffiliated entities, such as independent Directory Assistance Providers, will have a direct, simpler solution for access to the best directory assistance listings available. Direct access is less expensive to implement (involving less processing of data as it travels from one supplier to another) and will more readily advance competition in the directory assistance market to the benefit of end users of directory assistance listings.

As noted in the National Directory Assistance Order, for in-region listings, US WEST has “access to a more complete, accurate and reliable database than its competitors,”³⁶ but it does not have preferred access to directory assistance listings outside of its region. In urging this course of action on the Commission, Excell maintains that the Commission’s findings in the National Directory Assistance Order regarding US WEST’s practices, such as the refusal to provide unaffiliated entities with access to all of the numbers its operators use in providing directory assistance,³⁷ would be replicated if the Commission were to undertake the same investigation regarding other Bell Operating Companies and that such investigation is not now necessary and has not been necessary for years. The publicly available evidence of the Bell Operating Companies’ intransigence is overwhelming.

³⁵ Since it is likely that an RBOC will not pass on the in-region listings for subscribers in its service territory that have switched over to the services of another LEC, Excell urges the FCC to ensure that Directory Assistance Providers can obtain access to the databases of all LECs, not just the databases of the RBOCs.

³⁶ National Directory Assistance Order, para. 35.

³⁷ National Directory Assistance Order, para. 34.

In light of the language of §272(f)(1) of the 1996 Act,³⁸ Excell further requests that the Commission state now, as it extends the National Directory Assistance Order, that the requirement will not sunset, or if some sunset is applicable, that the sunset will not occur for a minimum of 7 years from the effective date of the rules adopted in this proceedings. The preferred position of US WEST, and other BOCs, with respect to in-region listings will diminish over time, but not at the speed contemplated in §272 of the 1996 Act.

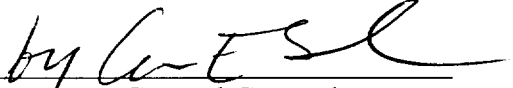
CONCLUSION

As explained in this proceeding, Excell Agent Services urges the Commission to use its authority found in several places the Communications Act to promote competition in the provision of directory assistance services. Rather than classifying independent Directory Assistance Providers, such as Excell, as falling outside the category of entities that should be afforded the benefits of nondiscriminatory access to directory assistance data, Excell instead urges the Commission to use its authority to require the LECs to provide this data on a nondiscriminatory basis to the Directory Assistance Providers.

³⁸ Section 272(f)(1) indicates that the provisions of §272, where, in part, the Commission found the authority to require US WEST to provide access to in-region directory assistance data, sunset 3 years after the subject Bell operating company is authorized to provide interLATA telecommunications services.

Respectfully submitted,

EXCELL AGENT SERVICES, L.L.C.



Mark Rogers, General Counsel

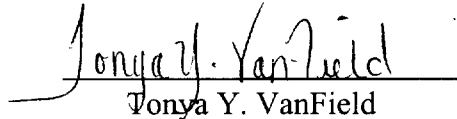
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CERTIFICATE OF SERVICE

I, Tonya Y. VanField, a secretary at the law firm of Fleischman and Walsh, L.L.P., hereby certify that a copy of the foregoing Excell Agent Services, L.L.C.'s "*Comments*" in CC Docket No. 99-273, was served this 13th day of October, 1999, *via hand delivery* on the following:

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